IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10375 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NN MAKWANA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10375 of 1998

TANNA ASSOCIATES for Petitioner No. 1-2

MR DIPAK R DAVE for Respondent No. 1

M/S PATEL ADVOCATES for Respondent No. 1

GOVERNMENT PLEADER for Respondent No. 1,2

MR PV HATHI for Respondent No. 3

RULE SERVED for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 06/11/2003

ORAL JUDGEMENT

1. The short facts of the case appear to be that the petitioners who are holding qualification of SSC, and employees of respondent No.3 Gujarat Labour Welfare Board (hereinafter referred to as "the Board"). It is the case of the petitioners that as per the policy of the Board, though the normal qualification for the post of Assistant Welfare Commissioner is of LL.B., Labour and Social Welfare Course Diploma or Decree and five years' experience of social work, but for the purpose of employees of Board itself who are serving, such qualification can be relaxed. It is also the case of the petitioners that earlier in the past, for such posts qualifications were relaxed and such action was challenged before the Industrial Tribunal and the Industrial Tribunal had also upheld such decision. It appears that on 24/27-1-1997 the circular was issued by the respondent Board for inviting applications for the post of Assistant Welfare Commissioner from amongst its own staff members. The post advertised were for four in number, out of which two were in General category, one was for Scheduled Caste and one was for SEBC. The case of the petitioner is that pursuant to the said circular, the petitioners had applied for the post. It is the further case of the petitioners that the Selection Committee had undertaken the process of selection and petitioner No.1 was appointed on the post under Scheduled caste category and petitioner No.2 was appointed on the post under General category, and other candidate was also appointed. Further, it appears that after the decision of the Selection Committee, the matter was placed before the respondent Board itself and by Resolution dated 20-2-1998 the appointment of three persons namely; S.J.Dave, petitioner No.2 herein, N.N.Makwana, petitioner No.1 herein, and one Hemaben K. Vaishnav was approved by the Board. It further appears that the decision of the Board for appointing the said three persons came to be challenged in SCA No.405/1998 at the instance of the Union, respondent No.4 herein and this Court (Coram: S.K.Keshote J.), as per the decision dated 28-1-1998, dismissed the petition, more particularly since the Union had approached the Additional Chief Secretary in this regard. It appears that the matter was thereafter further carried in the LPA being LPA No.543/1998 and in the said LPA, the Division Bench of this Court (Coram: K.G.Balakrishnan, C.J. - as then was & J.M.Panchal, J.), as per the decision dated 13-8-1998 directed the Additional Chief Secretary to give notice to the Appellant as well as the petitioners of SCA and it was further directed to afford the reasonable opportunity to

be heard and to pass reasoned order in the matter. It further appears that thereafter the matter was heard before the Additional Chief Secretary. However, as per the petitioners, the order is passed by Mr.Bagora, Deputy Secretary, whereas as per the State Government, it is the Additional Chief Secretary who has passed the order and Mr.Bagora, Dy. Secretary had only prepared the draft which is corrected and ultimately the order is passed by the Additional Chief Secretary. The said order came to be passed on 13-11-1998 and it is the said order which is challenged by the petitioners in this petition.

2. Mr.Tanna, learned Counsel appearing for the petitioners, contended inter alia that the Division Bench of this Court having directed the Additional Chief Secretary to give hearing and to pass the order, the said order could not have been passed by the Dy. Secretary, Mr.Bagora and, therefore, he submitted that the order is non-est and in any event it is in breach and contravention to the directions given by this Court in the aforesaid LPA. The perusal of the impugned order, more particularly at para 2, shows that there is recital in the order itself that the hearing was made before the Secretary and the petitioners, Ms.Vaishnav, the representative of the Union, Welfare Commissioner, Mr.Daraiya and Mr.Bagora, Dy. Secretary had remained present. Since such a grievance was raised, I have verified the original record which, inter alia, shows that the hearing was before the Secretary, however, the draft of the order came to be prepared by Mr.Bagora on 7-11-1998. The Secretary has made appropriate corrections and has added certain aspects and has finalized the order on 11-11-1998 and, therefore, merely because the Additional Chief Secretary has asked the Deputy Secretary, Mr.Bagora to prepare a draft which is not as it is approved, but is, by correction, addition and alteration, finalized, it cannot be said that the decision is taken by the Dy. Secretary and not by the Additional Chief Secretary. The original file it does reflect that the Secretary has finalized the order and at appropriate place corrections and additions are also made and, therefore, ultimately it is the Additional Chief Secretary who has passed the order and merely because the order is communicated by the Dy. Secretary, Mr.Bagora, it does not lose the character of passing the order by the Additional Chief Secretary and, therefore, the said contention of Mr.Tanna cannot be accepted and hence rejected.

Consequently, as observed earlier, the contention of Mr.Tanna that the order passed by the Secretary is

passed in contravention to the order passed by this Court earlier would render meritless and hence rejected.

3. The contention raised on behalf of the petitioner is that the Board, is an independent statutory Body and it has power to regulate its own procedure for the purpose of recruitment of the staff. It was submitted by Mr.Tanna that when the Board has taken policy decision of relaxation of the qualification in respect of its own employees, if the post of Assistant Welfare Commissioner is to be filled up from among its employees and when the Selection Committee, after undertaking the necessary procedure, had selected the petitioners, which was also approved by the Board and in the meeting of the Board the very Dy. Secretary or Mr.Bagora was also present, it would not be open to the State Government to take up the stand that the selection was illegal. In furtherance to his contention, Mr.Tanna also submitted that similar issue was dealt with by the Industrial Tribunal for the purpose of relaxation of qualification and the Industrial Tribunal has held that such relaxation can be made and, therefore, he submitted that the decision of the Secretary is, in any case, bad in law and cannot be sustained.

4. It appears that the qualification provided for the post of Assistant Welfare Commissioner is; (1) Graduate of Law, (2) Labour and Social Welfare Course, (3) 5 years' Experience of Social Work and (4) Requirement of Sufficient Knowledge of Gujarati Language.

5. It also appears that the post of Assistant Welfare Commissioner is a post to be filled up by selection. It may be that by residuary power the Board may make relaxation in the qualification of the candidate, but such power cannot be read as giving a total go-by to the basic qualification which are decided for the post in question. The contention sought to be raised on behalf of the petitioners is that as per the policy of the Board such posts are to be filled up from amongst its employees and thereafter only the candidates from outside can be considered. I am afraid such contention can be accepted. When any post is created with a particular qualification and when such post is to be filled up by selection, it must be made available to all concerned, including the employees of the Board. With a view to see that all eligible and qualified persons are allowed to compete and to have the public employments, it is obligatory on the part of the statutory Board like present Board to advertise the post in question and to invite applications from the qualified

persons. It may be that amongst the persons holding the same qualification the preference can be given to the employees of the Board itself, but such preference cannot be read as giving total go-by to the basic qualification for the post in question, nor such preference can be read so as to deprive the other eligible and qualified persons to apply for the post in question. It is an admitted position that neither the post was advertised, nor the petitioners or other candidate namely; Ms.Hemaben, were holding the above referred qualification for selection to the post in question. It is well settled that the basic norms for filling up of public post in normal circumstances would be to give advertisement and to invite applications from the eligible candidates and then to make selection from amongst the candidates who are available. A public employment should and must be made available to all eligible candidates and it can never be restricted to the existing staff of any public Body if such appointment is by selection. If the appropriate qualified candidates are not available even after making attempts and thereafter if some decision is taken to make relaxation in the qualification or to give some preference to the employees of the Board, the matter would be different. It has not come on record that any attempts were made by the Board to issue public advertisement for filling up of the post in question, nor has it come on record that the petitioners are holding the above referred qualifications for the post of Assistant Welfare Commissioner. Therefore, it appears that the process for recruitment and selection of Assistant Welfare Commissioner was per se bad in law and, therefore, in the impugned order, it has been rightly observed that if there is no way out, then only such relaxation can be made. Otherwise, the basic purpose and the quality of the education and nature of the post which is to be filled up by person who is holding the qualification would be frustrated.

6. Mr.Tanna made an attempt to submit that no reasons can be added, nor additional material can be considered while examining or testing the legality and validity of the impugned order, because in the contention of Mr.Tanna, the present petition is under Article 227 of the Constitution of India and, therefore, the authority who has passed quasi judicial order, cannot be allowed to make any addition or to put up any material, for supporting the order, nor any additional reasons can be read or added in such order. Therefore, Mr.Tanna submitted that no other ground whatsoever can be considered for such testing the legality of the impugned order. I am afraid such contention can be accepted.

Firstly, the State Government enjoys the supervisory power over the functioning of the Board and such aspect is apparent from Sections 10, 15, and 16 of Bombay Labour Welfare Fund Act, 1953. Therefore, if any illegality is committed in the matter of recruitment of any staff by the Board, it would be within the domain and power of the State to examine the same and to issue directions and such directions are binding to the Board. Such powers of the State Government are by way of supervisory jurisdiction over the Board and it cannot be read as having the character of the power of the judicial or quasi judicial authority, where a lis is to be decided amongst parties by such authority. As observed earlier, one of the major grounds which is considered by the State Government in the impugned order is that for relaxation there should be a circumstance for showing "no way out", otherwise the basic purpose would be frustrated. In my view, such one of the grounds is sufficient to maintain the legality and validity of the order, more particularly when the nature of the order is under the supervisory jurisdiction of the State over the functioning of the Board. Merely because this Court directed the Secretary to decide the matter after giving opportunity of hearing to concerned, in my view, would not alter the character of the power or the nature of the dispute which essentially pertains to the supervisory power of the State Government. Therefore, Mr.Tanna is not right in submitting that no reasons can be added, nor any extra material can be considered while examining the legality and validity of the impugned order. As observed earlier, even otherwise also if the order is examined as it is, the order can be maintained for setting aside the selection process only on the ground that there are no such exceptional circumstances for making relaxation. The language used in the order is that no circumstances are shown that there is "no way out" to make relaxation of the qualification, otherwise if such relaxations are considered, it would frustrate the basic purpose of the selection process.

7. The petition, as such, is for challenging the order passed by the State Government in its supervisory jurisdiction, may be under the directions of this Court in the aforesaid LPA. Therefore, I find that it would be the petition essentially under Article 226 and not under Article 227 of the Constitution of India, because when the State Government exercises the power under supervisory jurisdiction as per the provisions of the Act, it will not have the trapping as that of the Tribunal, nor would there be any lis to be decided between the parties. It is a matter essentially where

the State Government under the supervisory power has examined the legality and validity of the selection process and has found that the selection process is bad in law and, therefore, the same is set aside and, therefore, I cannot accept the contention of Mr.Tanna that the petition is essentially under Article 227 of the Constitution of India.

8. In view of the aforesaid, it appears that the process for selection of the petitioners and one Ms.Vaishnav as per the decision of the Selection Committee and approved by the Board was, per se, bad in law and, therefore, the same cannot be allowed to be maintained when none of the candidates, both the petitioners and Ms.Vaishnav, were holding the basic qualification for the post in question and the said aspect is coupled with the fact that the settled norms for filling up the post of public employment are not followed. Therefore, even if the contention of Mr.Tanna is considered that no reasons can be added and the order should be quashed for not considering all the relevant aspects as sought to be canvassed and contended by the petitioners, such contentions cannot be entertained because, as observed earlier, it is an order passed in exercise of the supervisory jurisdiction and when any authority passes order in exercise of supervisory jurisdiction, it is not necessary that each and every contention must be dealt with like the judicial authority. Moreover, as per the decision of the Apex Court in case of "State of Maharashtra vs. Babulal Kriparam Thakore and Others", reported in AIR 1967 SC, 1353, it is settled legal position that such type of order, if can be maintained on one ground, the same would be sufficient and the order would not be vulnerable, merely because some other grounds cannot be maintained in law.

9. At this stage, it would be worthwhile to refer to the recent observations of the Apex Court at para 12 of the judgement in the case of "Roshan Deen v. Preetilal" reported in 2002(1) SCC, 100:

> "The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look-out of the High Court is, therefore, not merely to pick out any error law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law

> the High Court is not expected to erase such injustice in the name of correcting the error of law."

10. In any event, if such contentions are entertained and the order is set aside only on procedural or technical aspects, the consequences would be that the illegal action of selection process would get revived which, in my view, cannot be allowed to be done by this Court while exercising power under Article 226 or even under Article 227, while exercising extraordinary and plenary and equitable jurisdiction of this Court. In view of the aforesaid, I find no merit in the petition and hence the same deserves to be dismissed.

11. The petitioners have moved an application being MCA No.1168/2003 in SCA No.10375/1998 for passing appropriate orders against the respondents particularly respondent No.3 herein under Order 39 Rule 2A of Civil Procedure Code on the ground that after the order dated 13-3-2003 passed by this Court in MCA No.118/2003, in SCA No.10375/1998, the petitioner No.1 is not allowed to work as Assistant Welfare Commissioner. The contention of Mr.Tanna was that the dignity and sanctity of the order of this Court should have been maintained. The contention of the authority is that before the order dated 13-3-2003 was received by the authority, petitioner No.1 was already reverted to the original post and since the matter was pending, no further action is taken. I would have considered the matter further, however, in view of the aforesaid observations and findings by this Court that there is no substance in this petition, I find that no useful purpose would be served in entertaining the application since the main matter is not entertained. Hence, this application is disposed of accordingly.

12. In the result, the petition fails. However, it is clarified that the period during which the respective petitioners continued to function as Assistant Welfare Commissioner pursuant to the interim order passed by this Court shall be treated on the principles of quantum merit and by the dismissal of the present petition the Board will not be entitled to recover any amount of the difference of salary since the concerned petitioners have worked on the post under the interim order of this Court. However, for the purpose of regular status and for other retiral benefits the concerned petitioners shall be treated to their original post and not on the post of Assistant Welfare Commissioner.

13. Subject to the aforesaid observations, petition is dismissed. Rule discharged accordingly. Considering the facts and circumstances of the case, no cost.

6-11-2003 (Jayant Patel, J.)

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